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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 19....

No. 942

GILVIN-TERRILL, INC.,
Petitioner,

vs.

NATIONAL LABOR RELATIONS BOARD,
Respondent.

PETITION FOR A WRIT OF CERTIORARI IN THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

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Petitioner, Gilvin-Terrill, Inc., prays that a Writ of Certiorari be issued to review the judgment of the United States Court of Appeals for the Fifth Circuit entered in the above cause on January 7, 1965. Said cause in the United States Court of Civil Appeals for the Fifth Circuit is styled "NATIONAL LABOR RELATIONS BOARD, Petitioner, v. GILVIN-TERRILL, INC., Respondent" and is numbered 21203 on the docket of said Court.

OPINION

The opinions of the United States Court of Appeals for the Fifth Circuit, dated November 27, 1964, has not been reported. A copy of it is appended to this petition in the Appendix at Page A1.

JURISDICTION

The United States Court of Appeals for the Fifth Circuit rendered its opinion, copy of which is appended as aforesaid, on the 27th day of November, 1964. Thereafter, Petitioner herein timely filed its petition for rehearing (R. 314) which was by said Court denied on the 29th day of December, 1964 (R. 321). A copy of the order denying the petition for rehearing is appended to this petition in the Appendix at Page A3.

On January 7, 1965, the United States Court of Appeals for the Fifth Circuit made its judgment and decree in this cause (R. 313). A copy of said judgment and decree is appended hereto in the Appendix at Page A4; and a copy of said Court's order staying enforcement is appended hereto in the Appendix at Page A5.

The jurisdiction of this Court is invoked under U.S.C. 1254(1)

QUESTIONS PRESENTED

In a representation case involving International Union of Operating Engineers, Local 191, AFL-CIO, as union, and Gilvin-Terrill, Inc., as employer of about two hundred employees, the National Labor Relations Board ordered as an appropriate bargaining unit for a segment of eight of said employees the following:

> "All employees at the Respondent's shop at 2000 Bolton St., Amarillo, Texas, including the timekeeper, but excluding all other employees * * *".

and ordered an election.

Petitioner declined to bargain with Union, assigning as its reason for not doing so, the invalidity and inappro-

priateness of the unit, prejudicial errors committed in the hearing upon which the Board's determination was so made, and other errors.

Thereafter, in a complaint proceedings, based upon such refusal to bargain, the National Labor Relations Board ordered Petitioner to bargain with union for the employees in such unit. Again petitioner refused to bargain, assigning as grounds therefor the reasons aforesaid and advising union and the National Labor Relations Board that short of a judicial review and a judicial enforcement order, it would not bargain with union.

The proceedings in the United States Court of Appeals for the Fifth Circuit was brought by the National Labor Relations Board for enforcement of its said order. As alleged in Petitioner's answer (R. 4) to the petition for enforcement so filed by the National Labor Relations Board, Petitioner again insisted that the bargaining unit so ordered by the Board was invalid as being capricious and arbitrary, that in ordering such a unit the Board gave controlling weight to the extent of union organization, that prejudicial errors were committed in the representation and complaint cases, and alleging that due to changed business conditions the case was moot. The United States Court of Appeals for the Fifth Circuit, in rendering its "per curiam" opinion, overruled all of Petitioner's contentions. It had never been insisted in any of the proceedings below that Petitioner has not timely and properly preserved its contentions.

The questions presented are:

Question 1: WHETHER the bargaining unit ordered in this case is invalid and *wholly* inappropriate because it is arbitrary and capricious; and whether it is legal and proper that a bargaining unit of only eight shop employees

be carved out of approximately two hundred employees of an employer engaged in the business of general highway construction over a wide portion of West Texas, where the operations of said employer are highly integrated and interdependent, its operations, policies and employees are controlled at its main and central office by top executives, its vacation, holiday and insurance plans are common to all employees, its stationery is ordered by its main office, its payrolls and checks are kept and issued at the same office, where there has been no history of bargaining with the alleged unit, and where the employees in the alleged unit intermingle with the remaining employees, and where a substantial number of the other employees have been transferred in and out of said shop. (A more detailed statement of the facts and circumstances surrounding the aforesaid statement of this question, and showing that the National Labor Relations Board and the Court below have improperly resolved it appear under the title of STATEMENT.)

Question 2: WHETHER it is prejudicial error and a denial of due process that an employer in a representation case be denied the right to show to what extent a union has tried to organize all of an employer's two hundred employees, before filing for a bargaining unit of only eight of them; and whether it was not error for the United States Court of Appeals for the Fifth Circuit to deny an enforcement order due to such error, or alternatively to remand the matter to the Board to conduct further hearing allowing the introduction of such excluded evidence.

Question 3: Considering that under this record, the only thing that could possibly justify and sustain the unit actually ordered in the case being that the majority of employees in the alleged unit favored the union, WHETHER the record does not show as a matter of law that extent

of organization was of necessity given controlling weight, therefore rendering the unit invalid.

Question 4: Considering that due to changed business conditions all the buildings and equipment situated at Bolton Street have been torn down and removed, that Petitioner does not maintain and carry on a repair shop operation in any respect of the character and purpose as was heretofore maintained and carried on by it at 2000 Bolton Street, that none of the employees in the alleged unit in the employment of Petitioner, that none of them have been replaced by other employees of the same classification and engaged in the same operations, and that this situation has not come about by any wrongful intent and deceit on the part of Petitioner to evade the order sought to be enforced, WHETHER this cause is not now moot and should be dismissed for said reasons, and in any event alternatively it should not be remanded to the National Labor Relations Board that it conduct further hearings and make its findings on such matters.

STATUTES AND REGULATIONS

The whole of Sec. 9 (29 U.S.C.A. Sec. 159) of the Labor Management Act. Sec. 9(c)(5) (29 U.S.C.A. Sec. 159(c)(5)) of said Act providing as follows:

> "In determining whether a unit is appropriate for the purposes specified in subsection (b) the extent to which the employees have organized shall not be controlling."

The fundamental constitutional concept that every litigant shall have "due process".

STATEMENT

Statement germane to Question 1: Petitioner reaffirms the position urged by it at all times in these proceedings that the only appropriate unit of its employees is a bargaining unit composed of all its employees companywide, eligible under the Act.

Under this record, Petitioner has scores of employees —nearly two hundred. They work as a team and as a unit. Their endeavors are highly integrated. They all contribute to getting done and completed a piece of work that Petitioner has bid for. Notwithstanding this patent fact, Union sought to carve out of these many employees (and Board permitted it), all working with a common purpose, a very small group; namely, five people that were mechanics, two people that were welders, and a timekeeper, having their headquarters and main place of work at 2000 Bolton Street, Amarillo, Texas.

This record shows conclusively that Petitioner is a corporation. That its main office is Amarillo, Potter County, Texas, at 413 East 3rd Street, Amarillo, Texas; that its policies are fixed in Amarillo, Texas, largely by Mr. Gilvin, its president, and Mr. Joe Terrill, one of its stockholders. In fact, there is not an autonomous plant or operation anywhere except at the Amarillo main office. This is not a situation where there are a chain of factories, all under the same management but with various factories having different geographical locations, manufacturing completed separate units, or even components shipped elsewhere to be assembled in a completed unit. Nor is this situation comparable to a chainstore operation and ownership, where there are different stores located at different localities. The operations of this Petitioner

all stem out of Amarillo and from the central office. It is true that from time to time the Petitioner has operations at different sites. But these are just "job operations". When a job is completed, the crews and work force move to some other job. This is not comparable at all to the chain-store operation where the stores in the several different communities are more or less permanently located at their respective sites. The number of employees vacillate up or down depending on the amount of work and contracts that the Employer is working on. In public utilities, where the utility has separate offices in the separate towns in which it operates and has franchises, and where the policies of the company are company wide and where the management is central, it is uniformly held that a company-wide unit is the only appropriate bargaining unit. If this be the rule in public utility cases, it should all the more be the rule in this case, for as stated, Petitioner's operations at any particular site are only for the completion of the job that it has at such site. It does not maintain separate offices, separate stores, separate "permanent" sites anywhere except in Amarillo. The Union evidently claims that because the shop involved in this hearing is not located where the general office is that such location makes it a separate unit and/or separate operation. Viewed properly the shop and general office do not have separate locations. The main business office of Petitioner, 413 East 3rd Street, is a downtown office in Amarillo. Obviously it does not have downtown space for the shop operations; furthermore, it would not be feasible that the shop operations be located downtown. But its location in the same town and only a short distance from the office does not minimize the fact that what it does is wholly integrated with the entire operations of Petitioner, and that its operation is not an inter-

dependent operation with Petitioner's whole operations and program.

This record makes it abundantly clear that there is an interchange of Petitioner's employees from one operation to another. That employees are often transferred not only from one job to another but from one classification to another.

There is a common policy with respect to all employees concerning hospitalization insurance, life insurance and pensions. There is a common policy with respect to wages and wage rates, and vacations. There is a common policy with respect to the lay off of men when work slackens.

Most of the employees of the Company have their home in Amarillo.

There is only one payroll. The checks for all employees are issued out of the Amarillo office.

All stationery is purchased by the main office. All the books and records of Petitioner are kept at the main office. All of the foregoing facts establish the highly integrated nature of Petitioner's operations, and how interdependent each operation is to Petitioner's total operations. There is functional integration of all operations, and an interchange of workers. There is a mutuality of purpose in each operation, all designed to make Petitioner's operation as a whole a "team operation." No operation is separate and complete unto itself. Each operation is designed to, and does, contribute its part to the "complete product"; namely, the completion of the job and the contract. Central control is in Amarillo. The Amarillo office makes the over-all policies. It is the function of the Amarillo office to see that each operation properly "gears into" the

operation as a whole. There is no operation working on a project that does not ultimately take its necessary place in the pattern of the completed work.

The record is clear that there is no history of prior bargaining with respect to any of Petitioner's employees. In the record, it is clear that this identical union was on a move to represent other employees of the Company. If this union is to represent the bargaining unit with respect to which it petitions in this proceedings, it is most incongruous that the Union take the position it should not represent all the employees—company-wide—of the Employer. And is to be believed for a moment that had it been able to organize all the employees, it would not be insisting that the unit should be Company-wide?

Now at the expense of proving a bit tedious—and under the penalty that too much space spent in discussing this point will cut down on the discussion of other points deemed by Petitioner just as important as this one—but to point out specifically wherein the record supports Petitioner's above statement of the record, the following references are made to the record.

The general office and place of business of Petitioner is at 413 East Third Street, Amarillo, Texas (R. 170). The Company policies are made at the Amarillo office (R. 170). The chain of command begins with Mr. Gilvin and Mr. Terrill (Company officials) and extends down through superintendents and foremen (R. 169). The supervisors, superintendents, foremen and the jobs themselves are in constant contact between themselves and the home office by radio equipped cars and telephone (R. 222-223). Employees are transferred from one job to another (R. 170). The books and records are kept at the Amarillo office (R. 171). The payroll is made out, and all checks are issued

at the Amarillo office (R. 171). The employees at the shop are sent to the job sites (R. 171-172). The over-all operation of Employer is a "one-unit operation". (R. 176). "Every bit of it has got to dove-tail with the other to make the over-all picture come out right". (R. 176). People are taken out of the shop and used in the field as operators (R. 189), and operators from the field have been put in the shop (R. 189). There are instances where employees have worked in the field three months and then go back to the shop (R. 189). "Our whole outfit is not based on people just doing the same thing. It's based on people that are working at different jobs. They work at whatever job is required." (R. 189). Transfers are made from one job to another and from one classification to another (R. 192). There were 37 field men transferred from their field operations to the shop since January 1, 1962 (R. 168 and 196). "Well, all forms, all stationery, all supplies of that kind come out of our Amarillo office. They are ordered by the office and furnished to the jobs or shop". (R. 175). Purchase of equipment is determined and made by the Amarillo office (R. 175). Group insurance, life insurance and pension plans are common as to all employees (R. 175). With shop as a bargaining unit and represented by the union, and considering the Employer's policy of the cross-transfer of its employees, it would mean "you would have then working there non-union men with union men." (R. 171). The vacation plan is the same to all employees. We do not think that either the rules, or the spirit thereof contemplate a more extended reference to the record than has been made above.

True, Section 9(b) of the Labor Management Relations Act empowers the National Labor Relations Board to determine what is an appropriate unit. But it is equally true that the Act by its own terms provides that the de-

terminations of the Board are subject to review by the Courts. It is the rule that an employer charged with an unfair labor practice for his failure to negotiate with the certified representative may challenge the authority and appropriateness of the unit. *Pittsburgh Plate Glass Co. v. NLRB,* 313 U.S. 146, 85 L. ed. 1251, 61 S. Ct. 908. As stated, Petitioner is in the road construction business. In *Greene Construction Co. and Broomall Construction Co.,* 133 NLRB 152, and 137 NLRB 37, respectively, the employers were construction companies having the same general type of operation as the Petitioner herein involved; and the Board held that they would not permit the Operating Engineers who, by the way, is the same Union involved in this proceeding, to carve out a segment from the entire system because to do so would seriously "fragmentize" a community of interest among all the employees. It is submitted that the Petitioner's situation is the same; and to have permitted a unit in the instant case, different from those in other similar type operations, is discriminatory as was held in *NLRB* v. *Industrial Rayon Corp.,* 291 F.2d 809, wherein it was held that the Board's actions were inconsistent and arbitrary. Also, see *NLRB* v. *Glen Raven Knitting Mills,* 235 F.2d 413. Again it is urged that the record wholly fails to show that the employees in the alleged unit constitute an autonomous and homogenous group. It is not shown wherein their interests are not in common with those of all of the other employees. The record wholly fails to show wherein if the union would be good for those in the small group it would not also be good for all the employees. This small group having failed to meet any test for their determination as a separate unit, it should fall as being arbitrary and capricious. If this small group is entitled to be declared a proper bargaining unit, then all restraints are off, and any group that union can persuade to favor it, and that

union proposes as a bargaining unit is due to be declared and established as a legal bargaining unit. This was never intended under the Act.

Statement germane to Question 2: In the representation hearing in this matter Petitioner was denied "due process". The record on the point, beginning at page 34 of the record and ending on page 37, is as follows:

MR. FULLINGIM: (For Gilvin-Terrill) Now, Mr. Hunley (He represented Union), I wonder if you're in a position now to stipulate into the record that International Union of Operating Engineers, Local 191, AFL-CIO are now and have been attempting and working in an effort to either get an agreement out of Gilvin-Terrill, Inc., as an over-all operating unit, or to get enough signed cards whereby they will call an election in an effort to try to unionize the entire system?

MR. HUNLEY: (For Union) Well, as to that, I think, Mr. Sheridan, it has no relevance here at all.

HEARING OFFICER: I don't think—

MR. FULLINGIM: Well, the purpose of it is this. We want to attempt to show, Your Honor, that the union is attempting to unionize this entire organization, I think under the late decisions, it is very important, and one of the things that they pointed out; that there has been no effort on the part of the union involved to try to unionize the entire system. That's one of the things they said that caused them to render a decision permitting partial unionization. I think it's very important in this record, and we'd sure want to show it.

HEARING OFFICER: Mr. Fullingim, I don't believe it's a matter that's relevant to this hearing, for this reason; that the petition very plainly states what unit the

union is seeking. I think it's self-explanatory, and I don't believe that that's a question that we need to go into at this time.

MR. FULLINGIM: I might—

MR. ADKINS: I'd like this observation; that it's offered also as a test of the sincerity of the union in their contention that they're just trying to unionize this shop as a proper bargaining unit.

HEARING OFFICER: Gentlemen, the Board's procedure is set up as an administrative procedure, which we don't go into in this hearing, but it's set up to examine the showing of interest which the union submits to us, and we use the company payroll in checking the show of interest That's the Board's procedure. I don't think we need to go into the extent of organization of the company other than that.

MR. ADKINS: May I make this question and observation?

HEARING OFFICER: Go ahead.

MR. ADKINS: They contend, in good faith, that the shop and, by this amendment, the four truck drivers out there constitute a proper bargaining unit. Isn't it permissible that we impeach their good faith with respect to their contention that this is a proper bargaining unit?

HEARING OFFICER: Well, you've already plainly stated your position that the company feels the appropriate unit should be a company-wide unit. Now I think that's the extent to which we'll go into that matter.

MR. ADKINS: Well, the additional proof we propose to make shows that we think that even in the union's mind they have some doubt about the appropriateness of this unit.

HEARING OFFICER: Well, we're not going to try to look into the union's mind at this hearing to find out what they think, I don't think that that's anything that we're capable of doing, in the first place, and I don't think it's relevant. I think that if you all have a witness now that you wish to call, why, I wish you'd go ahead, and we'll get this hearing over with.

MR. ADKINS: Well, note our exception to the ruling the Examiner has already made, and now we propose to introduce an exhibit.

MR. FULLINGIM: Yes. In connection with that, I'd like to state for the record, so I can have it as my bill for the Examiner's ruling, and so I can take it up, that we propose to introduce testimony that would clearly establish that this union involved in this hearing here is attempting to unionize the entire organization of Gilvin-Terrill, Inc. Then, in connection with this, I also ask that this be marked as an exhibit.

(The document above referred to was marked Employer's Exhibit No. 1 for identification.) See R. 307.

HEARING OFFICER: I assume that what you have just said was made as an offer of proof?

MR. FULLINGIM: Oh, yes. It's an offer of proof to protect my bill.

HEARING OFFICER: All right. This document you are going to introduce, is it part of your offer of proof?

MR. FULLINGIM: That's right. That's part of our offer of proof.

HEARING OFFICER: All right.

MR. FULLINGIM: In connection therewith, I now offer Employer's Exhibit No. 1, the same being a charge

of unfair labor practice at, brought by the International Union of Operating Engineers, Local 191, AFL-CIO.

HEARING OFFICER: All right. Your offer of proof is rejected. This exhibit will go in the rejected exhibits file.

(The document above-referred to, heretofore marked Employer's Exhibit No. 1, was rejected.) See R. 307.

MR. FULLINGIM: Now let me ask you this, Mr. Examiner.

MR. ADKINS: Well, wait just a moment.

HEARING OFFICER: Just a moment, gentlemen. One at a time, please.

MR. ADKINS: Will this go into the record?

HEARING OFFICER: Yes, sir. It goes into the record, but as a rejected exhibit.

MR. ADKINS: Thank you.

MR. FULLINGIM: Now will it also be shown without us—I understand you don't want us now to bring a witness for the purpose of establishing our bill. Now does the record suffice, and will this go in the record? We say to you that we'll produce witnesses that will testify that this union has been out on the general jobs of Gilvin-Terrill, Inc., endeavoring to get them to sign cards to join this union.

HEARING OFFICER: Yes, sir. I understand it is your offer of proof.

MR. FULLINGIM: That's right.

HEARING OFFICER: Along with this exhibit.

MR. FULLINGIM: That's right.

HEARING OFFICER: And your offer of proof has been rejected. We don't think that it's relevant as to this particular matter.

In *National Labor Relations Board* v. *Indiana & Michigan Electric Co.*, 318 U.S. 9, it is held:

> "The Act accords a great degree of finality to the Board's findings of fact, and this Court has been insistent that the admonition of the Act be strictly observed. But Courts which are required upon a limited review to lend their enforcement powers to the Board's orders are granted some discretion to see that the *hearings* out of which the conclusive findings emanate *do not shut off a party's right to produce evidence or conduct cross-examination material to the issue.* (The italics is ours). The statute demands respect for the judgment of the Board as to what the evidence proves. But the court is given discretion to see that before a party's rights are finally foreclosed his case has been fairly heard. Findings cannot be said to have been fairly reached unless material evidence which might impeach, as well as that which will support, its findings, is heard and weighed."

It is submitted there can never be a more flagrant violation of such rule, than as shown by the above quoted record. See also *Singer Sewing Machine Company* v. *NLRB*, 329 F.2d 200 (C.A. 4) and *Metropolitan Life Insurance Company* v. *NLRB*, 327 F.2d 906 (C.A. 1).

Statement germane to Question 3:

The National Labor Relations Board contends: "The provisions of Section 9(c)(5) are contravened only when the unit determination cannot be defended on any ground other than extent of organization." It is Petitioner's precise position that the unit determination made in this case cannot be defended on any ground other than extent of

organization. That the Board now says that extent of organization did not control is not enough. What does the record, together with reasonable inferences to be drawn therefrom, show? The Board's findings make no express statements on the point. They do not declare that controlling weight was not given extent of organization. Indeed, any declaration and finding that extent of organization did not control would be most suspect; for one reason, of course, the refusal of the Board to permit Petitioner by its tendered testimony to explore into the subject. Extent of organization is land was involved in this case. It was involved, and the Board, consciously or unconsciously, give it controlling weight. Note that the Board has not found it did not give it controlling weight! If the Board did not give controlling weight to extent of organization, then by process of elimination what did it give controlling weight, and how does it sustain the unit? For the reasons shown in the Argument under Question 1 it met none of the proper and accepted tests as a bargaining unit. Then the only other possible ground for its being appropriate is the extent of organization, and that is expressly prohibited by statute. This unit of "fragmentized" employees as opposed to a company-wide unit simply cannot be sustained except on the theory that controlling effect had to be given extent of organization. The cases of *Metropolitan Life Insurance Company* v. *National Labor Relations Board,* 327 F.2d 906 (C.A. 1) and *Singer Sewing Machine Co.,* 329 F.2d 200 (C.A. 4) are also most material here.

Statement germane to Question 4: In Petitioner's answer and affirmative defenses (R. 5) to the Board's petition for enforcement, it is shown

> "In all of Respondent's operations, it does not maintain and carry on a repair and shop operation as was heretofore maintained and carried on at 2000 Bolton

> Street. It is a fact that none of the eight above named former employees of Respondent have been replaced by Respondent with other employees of the same classification and engaged in the same operation as were the eight". (R. 9) (In the Court below, Petitioner herein was the Respondent).

This showing is preceded by a more detailed statement of the facts and circumstances showing that there would be and is not person remaining in the alleged unit for Union to represent and bargain for; thus raising the mootness of this case.

Again the Board once found in an official order that Local 191 of International Union of Operating Engineers, AFL-CIO is defunct and its activity in the Panhandle Area has ceased. This point is raised in Respondent's answer and the order so finding is quoted at Page 10 of the Record. The Union mentioned in said order is the identical union involved in this proceedings. Amarillo, Texas, is in the "Panhandle Area" mentioned in said order. True, the Board later changed the order (see Page 11 of the Record) to provide that Union was no longer interested in representing the employees, etc., but all of this later finding was ex parte as to Respondent.

But irrespective of what has been found with respect to whether said Local 191 is now defunct, Petitioner respectfully urges that as this cause is now moot it should be dismissed. The authorities so hold. 31 Am. Jur. at page 647 states the rules to be:

> "A petition for enforcement has been denied on the ground that the case had become moot by reason of supervening circumstances. The rule is that when circumstances have arisen after the making of a National Labor Relations Board order which may affect the propriety of its enforcement, the court in which

> enforcement is sought has discretion to decide the matter itself or to remand it to the Board for further consideration. Where the order obviously has become moot, the court can deny enforcement, without further ado; but where the matter is one involving complicated or disputed facts or questions of statutory policy, a remand to the Board is ordinarily in order."

In *National Labor Relations Board* v. *Delaware-New Jersey Ferry Co.*, 90 F.2d 520, the petition by the National Labor Relations Board to enforce an order that a ferry company should cease and desist from refusing to bargain was dismissed where the employees involved had made a contract with the bargaining representative on terms acceptable to all for a period of one year.

In *National Labor Relations Board* v. *Oregon Worsted Co.*, 94 F.2d 671, it was held proper that the National Labor Relations Board take further evidence on allegations and matters determinative of whether it would continue the proceedings for all or a part of the judicial remedy sought.

56 C.J.S., at page 371, states the rule to be:

> "The Court will decline to review or enforce an order of a labor relations board, and will dismiss a petition for its review or enforcement, where the questions involved have become moot, and to the extent that an employer has complied with any portion of an order of the Board he will not again be required to perform on the granting of a petition to enforce the order."

In *Lovemen, Joseph & Loeb* v. *National Labor Relations Board,* (C.A. 5), it was held that the death of a discharged employee rendered the question of his reinstatement moot.

In the case of *Continental Oil Co.* v. *National Labor Relations Board*, (C.A. 10) 113 F.2d 473, 313 U.S. 212, 85 L. Ed. 1292, it was held that the Court would not lend itself to the empty and futile gesture of commanding enforcement of an order of the Board directing collective bargaining with a unit which is nonexistent (Petitioner's very case)—with respect to questions which are nonexistent, arising out of operations which are nonexistent (again Petitioner's very case).

The case at bar is not the situation where an employee has been ordered reinstated and he has been reinstated. In such a case following a dismissal of the proceedings, he might be again discharged. Nor is the instant case a situation where the Board has ordered bargaining and after institution of enforcement proceedings, bargaining has begun, and for that matter, even a contract has been entered into, for in such a situation the need for bargaining is a continuing matter and the enforcement order would not be dealing with a moot problem.

The defense by Petitioner of an order to show cause why it is (or appears to be) in violation of an enforcement order would be expensive and time consuming. Such a proceedings would in effect be a contempt proceedings. Should Petitioner prevail at the end of such an action, still some stigma to it would necessarily result. In the light of the showing that the unit in this case is no longer in existence and in the further light that on one occasion at least the Board has declared the local union involved in this proceedings defunct at least as to the area here involved, it would not appear unreasonable that the Court deny enforcement of the Board's order; and if not deny enforcement, at least withhold such order until the National Labor Relations Board has satisfied itself on the issues urged under the Question 4.

In this proceedings the union has freely invoked the powers and authority of the Board, as it has a right to do. The Board has also freely invoked and used its own powers and has invoked the power and authority of the Court. The Court, if not satisfied that this case in its present posture should be dismissed for the reason that is moot, has the power to remand it to the Board for its further handling on the issue. The union and Board in this matter have had an agency or Court open to them on every issue raised by them. But is it to be the rule that Petitioner has no tribunal to hear a bona fide issue raised by it; that if it has a defense on this issue it must be urged (with all its attendant risk, expense and inconvenience) in a tribunal wherein it is charged with contempt?

REASONS FOR GRANTING THE WRIT

While it would be right and proper that a Writ of Certiorari issue in this cause for the redress of grievances of the particular private parties hereto, it is far more important and much in the public interest that this case be reviewed to the end that the errors committed in this cause be not renewed, and that guidelines be written to the end that the kind of bargaining unit established in this case where the employer is in the general construction business be not repeated and not become a precedent. The general construction business is a tremendous factor in the American economy; and not least among those engaged in such business are employers engaged in the road-building industry. Petitioner, as one engaged in said industry, insists that the National Labor Relations Board in ordering and establishing the character of bargaining unit set up by it in this case has misconstrued the law and has exceeded its powers. Certainly in the light of the Board's prior decisions and its decisions in this case, Petitioner and employers

all over America similarly situated need to know and the Board needs to be told that a group of employees, so fragmentized as is the case here, will not be countenanced as a legal bargaining unit. It is important to the industry nationwide, and to the economy of the nation, and in the interest of harmony between labor and management that this Court declare the law in this regard.

It is important that this Court again declare the law that no party to a labor representation cause shall be denied "due process" in the developments of its case in such a hearing, and that within the limitation that it be material, can introduce its evidence and testimony and develop its case as it sees fit.

Petitioner strongly urges that the Board in ordering the bargaining agent established by it in this cause, consciously or unconsciously, gave controlling weight to the extent of organization. There is no other way to account for the results reached. It is amazing the extent to which Section 9 (c) (5) of the Act has been and is being eroded away since its enactment. By mental gymnastics and semantics and under approaches such as "The Act does not provide that the proponent of a bargaining unit shall not be controlled by extent of organization" Section 9(c)(5) is being gradually whittled away. We do not find a single instance, at least in recent years, where a bargaining unit has been condemned for the reason that it violates Section 9(c)(5). Under the uniform denials of the Board that it has been motivated by extent of organization, and under its declarations that it is unconcerned that Union is motivated by extent of organization, Section 9(c)(5) of the Act and the intent of Senator Taft and the others that sponsored it into law have become virtually meaningless. In the interest that Section 9(c)(5) is a part of the law until repealed, this Court should in the public interest

write on the subject and should hold that when the Board orders a bargaining unit that cannot be sustained on any possible basis other than extent of organization that the Board evidently did give controlling weight to such extent of organization notwithstanding its protestations to the contrary.

Finally, there are cases holding that under the circumstances pleaded by Petitioner, the United States Court of Appeals for the Fifth Circuit should have dismissed this case. There are cases holding to the contrary. Then there is a line of cases holding that in a situation of this sort the Court should have, in the exercise of its supervisory powers, at least remanded the case to the Board for further hearing and handling. It is the position of Petitioner that its answer at least raises a fact issue on whether the cause is moot, and that in any event the lower court should have remanded the case to the Board for further hearing and handling on this aspect of the case. It should be a part of our jurisprudence—and it is in the public interest that this court so declare—that an employer should not be relegated solely to the pressure and duress of a contempt proceedings in the determination in the first instance of the truth of its allegations that a cause is moot by reason of changed business conditions. It should be the law, and so declared by this Court, that as the Courts are granted supervisory powers of the National Labor Relations Board they should in a proper case, as is this, remand a cause to the Board for its further handling on fact issues of whether a cause, by reason of changed business conditions, is moot.

CONCLUSION

For the reasons set forth, it is respectfully submitted that this petition for a Writ of Certiorari should be granted.

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Of Counsel

CERTIFICATE OF SERVICE

The undersigned certifies that a copy of Petitioner's (Gilvin-Terrill, Inc.) above Petition for Writ of Certiorari in the above captioned case has this day been served by first class air mail on the following Counsel at the address listed below:

Marcel Mallett-Prevost
Assistant General Counsel
NATIONAL LABOR RELATIONS BOARD
WASHINGTON, D.C.

Wales H. Madden Jr

WALES H. MADDEN, JR.
210 First National Bank Building
Amarillo, Texas
Counsel for Gilvin-Terrill, Inc., Petitioner

Dated at Amarillo, Texas, this the 26 day of February, 1965.

IN THE

United States Court of Appeals

FOR THE FIFTH CIRCUIT

No. 21203

NATIONAL LABOR RELATIONS BOARD,
Petitioner,

versus

GILVIN-TERRILL, INC.,
Respondent.

Petition for Enforcement of an Order of the National Labor Relations Board, sitting at Washington, D. C.

(November 27, 1964.)

Before TUTTLE, Chief Judge, BROWN and GEWIN, Circuit Judges.

PER CURIAM: This is a petition for the enforcement of an order of the National Labor Relations Board arising out of a finding by the Board that the respondent company had violated section 8(a)(5) and (1) of the Act[1] by refusing to bargain with the union certified as the

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1. 29 U.S.C.A., Sec. 151 et seq.

representative of the company's shop employees. The company refused to bargain for the asserted reason that the bargaining unit covered by the certification was inappropriate since it involved less than a company-wide unit.

We are not convinced that the Board abused its discretion in determining the issue as to the appropriate bargaining unit.

The order will be ENFORCED.

IN THE

United States Court of Appeals

FOR THE FIFTH CIRCUIT

No. 21,203

NATIONAL LABOR RELATIONS BOARD,
Petitioner,

vs.

GILVIN-TERRILL, INC.,
Respondent.

On Petition for Enforcement of an Order of the National Labor Relations Board, sitting at Washington, D. C.

(December 29, 1964)

On Petition for Rehearing

Before TUTTLE, Chief Judge, BROWN and GEWIN, Circuit Judges.

PER CURIAM:

IT IS ORDERED that the petition for rehearing in the above numbered and entitled cause be, and the same is hereby DENIED.

United States Court of Appeals

FOR THE FIFTH CIRCUIT

NATIONAL LABOR RELATIONS BOARD, Petitioner, v. GILVIN-TERRILL, INC., Respondent.	No. 21203

Decree

Before: Tuttle, Chief Judge, Brown and Gewin, Circuit Judges.

BY THE COURT:

THIS CAUSE came on to be heard upon the petition of the National Labor Relations Board for the enforcement of a certain order issued by it against the Respondent on July 29, 1963. The Court heard argument of respective counsel on November 17, 1964, and has considered the briefs and transcript of record filed in this cause. On November 27, 1964, the Court being fully advised in the premises, handed down its decision granting enforcement of the Board's order.

ON CONSIDERATION WHEREOF, it is ordered, adjudged, and decreed by the United States Court of Appeals for the Fifth Circuit that the said order of the National Labor Relations Board in said proceeding be enforced and that Respondent, Gilvin-Terrill, Inc., Amarillo, Texas, its officers, agents, successors, and assigns, abide by and perform the direction of the Board in said order contained.

ENTERED: JAN 7 1965

(ORIGINAL FILED JAN. 7, 1965)

United States Court of Appeals

FOR THE FIFTH CIRCUIT

NATIONAL LABOR RELATIONS BOARD,
Petitioner,
versus
GILVIN-TERRILL, INC.
Respondent.

No. 21203

ON CONSIDERATION OF THE APPLICATION of the Respondent, Gilvin-Terrill, Inc., in the above numbered and entitled cause for a stay of the mandate of this court therein, to enable it to apply for and to obtain a writ of certiorari from the Supreme Court of the United States, IT IS ORDERED that the issue of the mandate of this court in said cause be and the same is stayed for a period of sixty days; the stay to continue in force until the final disposition of the case by the Supreme Court, provided that within sixty days from the date of this order there shall be filed with the clerk of this court the certificate of the clerk of the Supreme Court that certiorari petition and record have been filed. It is further ordered that the clerk shall issue the mandate upon the filing of a copy of an order of the Supreme Court denying the writ, or upon the expiration of sixty days from the date of this order, unless the above-mentioned certificate shall be filed with the clerk of this court within that time.

DONE AT NEW ORLEANS, LA., this 6th day of January, 1965.

/s/ Walter P. Gewin
United States Circuit Judge.

(ORIGINAL FILED JAN. 7, 1965)

FILED
APR 12 1965
JOHN F. DAVIS, CLERK

No. 342

In the Supreme Court of the United States

OCTOBER TERM, 1964

GILVIN-TERRILL, INC., PETITIONER

v.

NATIONAL LABOR RELATIONS BOARD

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COUET OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR THE NATIONAL LABOR RELATIONS BOARD IN OPPOSITION

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In the Supreme Court of the United States

OCTOBER TERM, 1964

No. 942

GILVIN-TERRILL, INC., PETITIONER

v.

NATIONAL LABOR RELATIONS BOARD

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR THE NATIONAL LABOR RELATIONS BOARD IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (Pet. A1-A2) is reported at 338 F. 2d 971. The Board's decision and order in the unfair labor practice case (R. 105-107, 76-83)[1] are reported at 143 NLRB 868. The Board's decision and direction of election in the un-

[1] "R." and "J.A." refer to the printed transcript of record and joint appendix in the court of appeals, which have been filed with the petition.

derlying representation case (R. 29-32) are unreported.

JURISDICTION

The decision of the court of appeals was entered on November 27, 1964. A petition for rehearing was denied on December 29, 1964, and a decree was entered on January 7, 1965 (Pet. A1-A4). The petition for a writ of certiorari was filed on March 1, 1965. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTION PRESENTED

Whether the Board abused its discretion under Section 9(b) of the National Labor Relations Act or violated Section 9(c)(5) of the Act in establishing a bargaining unit consisting of the employees working at one of petitioner's shops rather than a unit consisting of all petitioner's employees.

STATUTE INVOLVED

The relevant provisions of the National Labor Relations Act, as amended (61 Stat. 136, 73 Stat. 519, 29 U.S.C., Sec. 151, *et seq.*) are as follows:

> Sec. 9(b) The Board shall decide in each case whether, in order to assure to employees the fullest freedom in exercising the rights guaranteed by this Act, the unit appropriate for the purposes of collective bargaining shall be the employer unit, craft unit, plant unit, or subdivision thereof. . . .
>
> * * * *

(c) * * *

(5) In determining whether a unit is appropriate for the purposes specified in subsection (b) the extent to which the employees have organized shall not be controlling.

STATEMENT

At a hearing on a representation petition filed by the International Union of Operating Engineers, Local 191, AFL-CIO (hereinafter "the Union"), which sought an election in a unit consisting of the employees at the petitioner's Bolton shop, the following facts were adduced:

The petitioner is an engineering construction firm engaged in the construction of highways and highway bridges (R. 30; J.A. 10). Its main office, from which it directs its operations in the northwest part of Texas, is located at 413 East Third Street, Amarillo, Texas. It employs some 191 employees on construction projects throughout that area (R. 30; J.A. 15, 55, 76).

Petitioner also maintains a shop at 2000 Bolton Street in Amarillo, about 3½ miles from the main office, where one foreman, one timekeeper, five mechanics and two welders are engaged in the repair of heavy construction equipment (R. 30; J.A. 60, 84, 122). The shop foreman, Floyd Weed, is directly in charge of the shop operations, and he has the authority to, and does, hire and discharge employees at the shop (R. 30; J.A. 61-62, 69-70, 112). Weed does not supervise truckdrivers or employees in the

field, such as equipment operators and laborers (R. 31; J.A. 62). Field employees are supervised by the field foremen (J.A. 68-69).

At the shop, the mechanics perform general mechanical repairs on such equipment as tractors, motor graders, and rollers (R. 30; J.A. 52, 110-112). Upon occasion, Foreman Weed sends them out into the field to perform repairs. At such times, they only perform a specific repair, remain under Foreman Weed's supervision, and return to the shop upon completion of the work (R. 30; J.A. 62, 67, 72-74, 91-92, 111-113, 117-121). Occasionally, when equipment is brought into the shop from the field, the operator of the equipment may come in with it. However, at such times, the operator does not come into the shop and work as a mechanic or a welder; he works only on his own equipment, remains classified as an operator, and returns to the field when the repair is completed (R. 30; J.A. 52-53, 65-66, 93-94, 112-116). With the exception of these temporary "transfers," there is no intermingling of shop employees and field employees. There is no previous bargaining history for the shop employees (R. 30; J.A. 41).

Upon these facts, the Board's Regional Director concluded that the employees in the shop constituted a "functionally homogeneous group" and that, "since there is no bargaining history for these employees, no union seeks a broader unit, the shop is physically separated from the Employer's other operations and there is independent supervision of the shop employees, we conclude that a unit limited to the shop

employees is appropriate" for the purposes of collective bargaining (R. 30). The Regional Director also found that the timekeeper, who maintains the time records and the parts bin in the shop, was a plant clerical employee who, in accord with Board policy, should be included in the unit (R. 30-31; J.A. 83-84, 122). Accordingly, the Regional Director, on December 14, 1962, directed an election in a unit of (R. 31):

> All employees at the Employer's shop at 2000 Bolton, Amarillo, Texas, including the timekeeper, but excluding all other employees, office clerical employees, truck drivers, professional employees, guards, watchmen, and supervisors as defined in the Act.[2]

Petitioner filed a request with the Board for review of the Regional Director's determination. It was denied as raising no substantial issues of fact or law warranting review (R. 78-79; J.A. 2-3, 32-45). The Union won the ensuing election, and it was certified as the bargaining representative (R. 78; J.A. 3, 50-53).

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[2] At the hearing, the Union amended its petition to include truckdrivers. Petitioner's truckdrivers are stationed in a building adjacent to the shop. Their primary duty is moving equipment from job site to job site. They also move equipment from the field to the shop, but they do not work in the shop, and they have separate supervision from the shop employees (R. 31; J.A. 43-44, 62-64, 85, 122-123). The Regional Director concluded that the truckdrivers are engaged in transportation, that their interests are dissimilar from those of the shop employees, and that they should be excluded from the unit (R. 31).

The Union then requested the petitioner to bargain with it, but petitioner refused, asserting that the Board's unit determination was invalid (R. 78; J.A. 3). In the ensuing unfair labor practice case, the Board found that petitioner violated Section 8(a)(5) and (1) of the Act by refusing to recognize and bargain with the Union (R. 105-107, 80-81). The Board ordered the petitioner to cease and desist from its unfair labor practice, to bargain with the Union upon request, and to post appropriate notices (R. 105-107, 81-85).

The court of appeals, in a *per curiam* decision, found that the Board did not abuse its discretion in establishing the shop-wide unit, and it enforced the Board's order (Pet. A1-A2).

ARGUMENT

The decision of the court of appeals is correct. It is not in conflict with the decision of any other court, and there is no occasion for further review.

1. Petitioner's initial claim that the Board abused its discretion in carving out the shop employees as a separate bargaining unit (Pet. 5-12) is without merit. The normal working site of the shop employees is physically separated from petitioner's other operations; the shop employees are under independent supervision; and there is no permanent interchange between them and other employees (pp. 3-4, *supra*). In these circumstances, it was reasonable for the Board to conclude that the shop employees

constituted a separate functional unit or subdivision of petitioner's operations.[3]

There is no substance to petitioner's contention that the "integrated" nature of its operation made only a company-wide unit appropriate. The degree of "integration" in the operation involved in this case is essentially the same as that in many others where the various segments of the business are interdependent in an overall sense. But such "integration," at best, merely provides several alternative appropriate units among which the Board must choose. If the Board's choice of a smaller unit is reasonable, as it is here, the fact that a larger unit would also be appropriate is insufficient to show an abuse of discretion. *National Labor Relations Board* v. *Smythe*, 212 F. 2d 664, 667-668 (C.A. 5); *National Labor Relations Board* v. *Burroughs Corp.*, 261 F. 2d 463, 466-467 (C.A. 2); *The Mountain States Telephone and Telegraph Co.* v. *National Labor Relations Board*, 310 F. 2d 478, 480 (C.A. 10); *General Instrument Corp.* v. *National Labor Relations Board*, 319 F. 2d 420, 422-423 (C.A. 4), certiorari denied, 375 U.S. 966.

2. Petitioner's contention (Pet. 16-17) that the Board violated Section 9(c)(5) of the Act stands on no better footing. That provision "was not intended to prohibit the Board from considering the extent of organization as one factor, though not the control-

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[3] *Greene Construction Co.*, 133 NLRB 152, and *Broomall Construction Co.*, 137 NLRB 344 (Pet. 11), are not to the contrary. The units sought and found inappropriate there did not, as here, have a physically separate work place under separate intermediate supervision.

ling factor, in its unit determination." *National Labor Relations Board* v. *Metropolitan Life Insurance Co.*, No. 98, this Term, decided April 5, 1965. Since, as we have shown, the unit determination here was based partly upon expressed principles other than extent of organization—such as physical separation and independent supervision—no issue under Section 9(c)(5) is presented. Nor was it a denial of due process for the Board to decline to hear the testimony petitioner was prepared to offer, showing that the Union was motivated by extent of organization in requesting the shop unit (Pet. 12-16). That evidence, even if true, was irrelevant, because the question under Section 9(c)(5) is whether *the Board* is motivated by the extent of organization, and not what prompted the Union to make the request.

3. Petitioner contends (Pet. 17-21) that, after the Board entered its order, it discontinued the operation at 2000 Bolton, and thus the bargaining order became moot and should not have been enforced by the court of appeals. But, under settled authority, the proper time to determine the facts raised by such an allegation and the steps which may be necessary to conform the order to any changed situation is during the subsequent compliance stage of the Board's proceeding. *National Labor Relations Board* v. *Mexia Textile Mills, Inc.*, 339 U.S. 563; *National Labor Relations Board* v. *Electric Steam Radiator Corp.*, 321 F. 2d 733, 738 (C.A. 6); *National Labor Relations Board* v. *Trinity Valley Iron and Steel Co.*, 290 F.

2d 47, 48 (C.A. 5).[4] The facts alleged by petitioner do not show that the only permissible course available to the Board at the compliance stage is to vacate the order. It appears that petitioner is still in business, and it may, in the future, decide to resume the repair work formerly done by the employees who made up the unit involved in this case.[5]

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[4] *National Labor Relations Board* v. *Delaware-New Jersey Ferry Co.*, 90 F. 2d 520 (C.A. 3); and *National Labor Relations Board* v. *Oregon Worsted Co.*, 94 F. 2d 671 (C.A. 9) (Pet. 19), which hold that compliance renders a Board order moot, preceded, and are inconsistent with, *Mexia*.

[5] For this reason, *Continental Oil Co.* v. *National Labor Relations Board*, 113 F. 2d 473, 478 (C.A. 10), modified on another point and remanded, 313 U.S. 212 (Pet. 20), is distinguishable. The court there noted that the facts stated by the company demonstrated that the operation involved would never be resumed.

CONCLUSION

For the above reasons, the petition for a writ of certiorari should be denied.

Respectfully submitted,

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April 1965

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